**ABDUL GHANI HAROON**

**v.**

**KETUA POLIS NEGARA & ANOTHER APPLICATION (NO 2)**

HIGH COURT MALAYA, SHAH ALAM
HISHAMUDIN YUNUS J
[CRIMINAL APPLICATION NOS: 44-9-2001 & 44-10-2001]
12 MAY 2001

***CRIMINAL PROCEDURE:*** *Habeas corpus - Decisions and directions - Stay of execution - Ruling by High Court that applicants have constitutional right to be present at hearing of their habeas corpus applications - Whether such ruling appealable - Whether High Court can order stay of such ruling - Criminal Procedure Code, ss. 365, 374*

***CRIMINAL PROCEDURE:*** *Habeas corpus - Decisions and directions - Appealability - Whether decision or direction final - Ruling by High Court that applicants have constitutional right to be present at hearing of their habeas corpus applications - Whether such ruling appealable - Whether High Court can order stay of such ruling - Criminal Procedure Code, ss. 365, 374*

This was an oral application by the Inspector General of Police ('the respondent') for a stay of the ruling ('the said ruling') of the court directing the two applicants herein to be produced in court for the hearing of their *habeas corpus* applications. The instant court had earlier ruled, as a preliminary issue, that the applicants had a legal and a constitutional right to be present in court at the hearing of their *habeas corpus* applications (see [2001] 2 CLJ 574).

**Held:**

**[1]** Under Chapter XXXVI of the Criminal Procedure Code ('the Code') the right to appeal against a decision or direction of the High Court, as conceived by s. 374 of the Code, refers only to a final decision or direction made under s. 365 of the Code. The said ruling here was not a final decision or direction; it was neither a decision allowing or disallowing the *habeas corpus* applications nor a direction in connection with such a decision. It was a procedural ruling which did not finally dispose of the applications. The said ruling was, therefore, not appealable and, accordingly, the question of a stay of execution did not arise.

*[Oral application for stay dismissed.]*

**Case(s) referred to:**

*Abdul Ghani Haroon v. Ketua Polis Negara & Another Application [2001] 2 CLJ 574* ***(refd)***

*Minister for Home Affairs, Malaysia & Anor v. Karpal Singh (No 2) [1988] 3 MLJ 85* ***(foll)***

**Legislation referred to:**

Criminal Procedure Code, ss. 311, 365, 374
Federal Constitution, art. 5(2)
Internal Security Act 1960, s. 73(1)

*For the applicants - R Sivarasa (Kamarul Hisham, Kandasamy Palaniandy, Saiful Izham, Hamidzun Khairuddin with him); M/s Selvam Shanmugam & Partners*
*For the respondent - Abdul Wahab Mohd SFC (Abdul Rashid Sudin SFC with him)*

*Reported by Gan Peng Chiang*

## JUDGMENT

**Hishamudin Yunus J:**

This is an oral application by the respondent, the Inspector General of Police, Malaysia, for a stay of execution of my ruling which I have just made a moment ago on a preliminary issue to the effect that the applicants in the present *habeas corpus* proceeding have a constitutional right to be present at the hearing of their *habeas corpus* application (there is a separate written judgment in respect of that ruling [2001] 2 CLJ 574). Encik Abdul Wahab bin Ahmad, the Senior Federal Counsel, on behalf of the respondent, informed the court, immediately after I have made the aforesaid ruling, that the respondent intends to appeal against my ruling to the Federal Court pursuant to s. 374 of the Criminal Procedure Code (the "CPC"). He orally applies for a stay of execution pursuant to s. 311 of the CPC. The learned Senior Federal Counsel submits that the applicants were arrested under the Internal Security Act 1960; that the arrests are connected with internal security and public order; and that the production of the applicants in court might attract a large crowd which might interrupt the smooth running of the court's proceedings.

Encik R. Sivarasa, the learned counsel for the applicants, on the other hand, submits that the respondent cannot in law apply for a stay of execution pending appeal. He argues that the ruling that I have just made is not appealable in the first place, relying on s. 374 of the CPC itself and the interpretation of that provision by the Supreme Court in *Minister for Home Affairs, Malaysia & Anor v. Karpal Singh (No. 2)* [1988] 3 MLJ 85.

Now, a brief account of the background might be useful. The applicants, Encik Abdul Ghani Haroon and Encik Gobalakrishnan a/l Nagappan are officials of the political party, Parti Keadilan Nasional. They have been arrested under s. 73(1) of the Internal Security Act 1960 (the ISA).

The two detainees, have separately applied to this court for a writ of *habeas corpus*, through Criminal Application 44-9-2001 and Criminal Application 44-10-2001. The applications are made pursuant to s. 365 of the CPC (to be read with art. 5(2) of the Federal Constitution). By consent, these two applications have been consolidated and are being heard together.

The common respondent in the applications is the Inspector General of Police.

A few days before the commencement of the hearing on 23 April 2001, the deputy registrar of this court had caused to be issued and served on the respondent a "Notice to Produce" so that the applicants could be present at the hearing of their applications. This is the normal practice of this court in all *habeas corpus* proceedings, regardless of the nature of the detention. But the respondent had failed to comply with the order. The respondent had no intention to disobey the court's order. The position taken by the respondent was that, in law, the applicants have no right to be present at the hearing of their applications.

The applicants contended otherwise.

Thus there was a preliminary issue before this court: In law do the applicants have the right to be present at the hearing of their applications?

Encik Sivarasa for the applicants insisted that they have the right to be present.

The learned senior federal counsels, Encik Abdul Wahab and Encik Abdul Rashid Sudin, on the other hand, submit that they have no right.

After hearing arguments from both sides for several days, I had reserved my decision to today, Friday 4 May; and that decision was delivered a moment ago. In my decision I ruled that, by virtue of cl. (2) of art. 5 of the Federal Constitution, the right to apply to the High Court for a writ of *habeas corpus* is not merely a legal right but also a constitutional right available to any person who believes that he has been unlawfully detained. The right being a constitutional right, it should follow that he has every right to be present in court at the hearing of his application. In other words, the right to be present is a constitutional right implicit in cl. (2) of art. 5.

Accordingly, I made an order that the applicants be produced in court at the continued hearing of this *habeas corpus* proceeding, and that the deputy registrar of this court shall caused to be issued and served on the respondent a fresh Notice to Produce.

Now, as I have said earlier, the above ruling led to the immediate oral application for a stay of execution by the respondent.

Having considered the arguments of both sides, in my judgment, this oral application for stay must be rejected.

I accept the contention by Encik Sivarasa that there is no right of appeal against my ruling. If there is no right of appeal, then the question of stay pending appeal does not arise.

Section 374 of the CPC provides:

**Appeal.**

374. Any person aggrieved by any decision or direction of the High Court under this Chapter may appeal to the Federal Court within thirty days from the date of the decision or direction appealed against.

The word 'Chapter" in the above provision refers to Chapter XXXVI of the CPC bearing the title:

**Directions Of The Nature Of A *Habeas Corpus***

Chapter XXXVI begins with s. 365 and ends with s. 375. Section 365 reads:

**Power of High Court to make certain orders.**

365. The High Court may whenever it thinks fit direct –

(a) That any person who:

(i) is detained in any prison within the limits of Malaysia on a warrant of extradition whether under the Extradition Act 1992; or

(ii) is alleged to be illegally or improperly detained in public or private custody within the limits of Malaysia,

be set at liberty;

(b) that any defendant in custody under a writ of attachment be brought before the Court to be dealt with according to law.

Now, I am more inclined to regard my ruling as being in the nature of both: it is a decision as well as a direction. But for the purpose of deciding on this oral application for stay, I think, it really does not matter whether one calls the ruling a "decision" or whether one calls it a "direction"; or whether one considers the ruling to be having the nature of both.

In *Karpal Singh (No. 2)*, the Supreme Court explains the meaning of the phrase "decision or direction" appearing in s. 374. Abdul Hamid Ag. LP (as he then was) said (at p. 85):

> The words 'decision or direction' under section 374 of the Code clearly must necessarily refer to the **final** decision or direction made under s. 365 of the Code. (emphasis added)

Thus the Supreme Court has given a qualified meaning to the words "decision or direction" in s. 374. What is appealable is not just any decision or direction under s. 365. It has to be a **final** decision or direction. Clearly the ruling that I have made, regardless whether one calls it a decision or a direction, although it is a decision or direction under s. 365 of the CPC, nevertheless, it is not a **final** decision or direction. It is not a final decision or direction because it is not a decision allowing or disallowing the application for a writ of *habeas corpus*; nor is it a direction in connection with such decision. It is merely a decision granting the applicants the right to be present at the hearing of their *habeas corpus* applications and the consequential direction to the respondent for their production in court. It is only a procedural ruling and the ruling does not finally dispose of the application. Therefore, it is not appealable.